

**Representative Mike Thompson** proposes the following substitute bill:

**PARTIAL BIRTH ABORTION AMENDMENTS**

2004 GENERAL SESSION

STATE OF UTAH

**Sponsor: Curtis S. Bramble**

5	Gregory S. Bell	Thomas V. Hatch	Howard A. Stephenson
6	Leonard M. Blackham	Parley G. Hellewell	David L. Thomas
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8	Dan R. Eastman	Lyle W. Hillyard	Michael G. Waddoups
9	Beverly Ann Evans	Scott K. Jenkins	Carlene M. Walker
10	James M. Evans	Sheldon L. Killpack	Bill Wright
11	David L. Gladwell	Peter C. Knudson	L. Alma Mansell

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**LONG TITLE**

**General Description:**

This bill modifies sections of the Utah Criminal Code relating to partial birth abortion.

**Highlighted Provisions:**

This bill:

- ▶ revises definitions;
- ▶ prohibits and makes criminal and civil penalties for a physician that performs a partial birth abortion;
- ▶ provides and sets limitations on remedies for a father or the maternal grandparents of the fetus;
- ▶ provides that a physician accused of an offense of performing a partial birth abortion is entitled to a hearing before the Physicians Licensing Board or Osteopathic Physician and Surgeon's Licensing Board to determine the necessity of the physician's conduct; **h** [and]
- ▶ **PROVIDING FOR CONTINGENT CONTINUANCE OF PRIOR LAW; AND h**
- ▶ makes technical changes.



28 **Monies Appropriated in this Bill:**

29 None

30 **Other Special Clauses:**

31 None

32 **Utah Code Sections Affected:**

33 AMENDS:

34 **76-7-301**, as last amended by Chapter 70, Laws of Utah 1993

35 **76-7-310.5**, as enacted by Chapter 267, Laws of Utah 1996

36 **76-7-314**, as last amended by Chapter 267, Laws of Utah 1996

37 ENACTS:

38 **76-7-326**, Utah Code Annotated 1953

39 **76-7-327**, Utah Code Annotated 1953

40 **76-7-328**, Utah Code Annotated 1953

41 **76-7-329**, Utah Code Annotated 1953

41a **Ĥ 76-7-330, Utah Code Annotated 1953 ĥ**



43 *Be it enacted by the Legislature of the state of Utah:*

44 Section 1. Section **76-7-301** is amended to read:

45 **76-7-301. Definitions.**

46 As used in this part:

47 (1) "Abortion" means the intentional termination or attempted termination of human  
48 pregnancy after implantation of a fertilized ovum, and includes any and all procedures  
49 undertaken to kill a live unborn child and includes all procedures undertaken to produce a  
50 miscarriage. "Abortion" does not include removal of a dead unborn child.

51 (2) "Medical emergency" means that condition which, on the basis of the physician's  
52 good faith clinical judgment, so [~~complicates the medical condition~~] threatens the life of a  
53 pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death,  
54 or for which a delay will create serious risk of substantial and irreversible impairment of major  
55 bodily function.

56 (3) (a) "Partial birth abortion" means an abortion in which the person performing the  
57 abortion:

58 (i) deliberately and intentionally vaginally delivers a living fetus until, in the case of a

59 head first presentation, the entire fetal head is outside the body of the mother, or, in the case of  
 60 breech presentation, any part of the fetal trunk past the navel is outside the body of the mother,  
 61 for the purpose of performing an overt act that the person knows will kill the partially delivered  
 62 living fetus; and

63 (ii) performs the overt act, other than completion of delivery, that kills the partially  
 64 living fetus.

65 (b) "Partial birth abortion" does not include the dilation and evacuation procedure  
 66 involving dismemberment prior to removal, the suction curettage procedure, or the suction  
 67 aspiration procedure for abortion.

68 (3) "Physician" means a medical doctor licensed to practice medicine and surgery  
 69 under [the] Title 58, Chapter 67, Utah Medical Practice Act, a physician in the employment of  
 70 the government of the United States who is similarly qualified, or an osteopathic physician  
 71 licensed to practice osteopathic medicine under [the] Title 58, Chapter 68, Utah Osteopathic  
 72 [Medicine Licensing] Medical Practice Act.

73 (4) "Hospital" means a general hospital licensed by the Department of Health  
 74 according to Title 26, Chapter 21, and includes a clinic or other medical facility to the extent  
 75 that such clinic or other medical facility provides equipment and personnel sufficient in  
 76 quantity and quality to provide the same degree of safety to the pregnant woman and the  
 77 unborn child as would be provided for the particular medical procedures undertaken by a  
 78 general hospital licensed by the Department of Health. It shall be the responsibility of the  
 79 Department of Health to determine if such clinic or other medical facility so qualifies and to so  
 80 certify.

81 Section 2. Section **76-7-310.5** is amended to read:

82 **76-7-310.5. Prohibition of specified abortion procedures -- Viability defined.**

83 ~~[(1) As used in this section:]~~

84 ~~[(a) "Partial birth abortion" or "dilation and extraction procedure" means the~~  
 85 ~~termination of pregnancy by partially vaginally delivering a living intact fetus, purposefully~~  
 86 ~~inserting an instrument into the skull of the intact fetus, and utilizing a suction device to~~  
 87 ~~remove the skull contents. This definition does not include the dilation and evacuation~~  
 88 ~~procedure involving dismemberment prior to removal, the suction curettage procedure, or the~~  
 89 ~~suction aspiration procedure for abortion.]~~

90 ~~[(b) "Saline]~~ (1) As used in this section, "saline abortion procedure" means  
91 performance of amniocentesis and injection of saline into the amniotic sac within the uterine  
92 cavity.

93 (2) (a) After viability has been determined in accordance with Subsection ~~[(b)]~~ (2)(b),  
94 no person may knowingly perform ~~[a partial birth abortion or dilation and extraction procedure,~~  
95 ~~or] a saline abortion procedure[;]~~ unless all other available abortion procedures would pose a  
96 risk to the life or the health of the pregnant woman.

97 (b) For purposes of this section determination of viability shall be made by the  
98 physician, based upon his own best clinical judgment. The physician shall determine whether,  
99 based on the particular facts of a woman's pregnancy that are known to him, and in light of  
100 medical technology and information reasonably available to him, there is a realistic possibility  
101 of maintaining and nourishing a life outside of the womb, with or without temporary, artificial  
102 life-sustaining support.

103 (3) Intentional, knowing, and willful violation of this section is a third degree felony.

104 Section 3. Section **76-7-314** is amended to read:

105 **76-7-314. Violations of abortion laws -- Classifications.**

106 (1) (a) Any person who intentionally performs an abortion other than as authorized by  
107 this part is guilty of a felony of the third degree.

108 (b) (i) Notwithstanding any other provision of law, a woman who seeks to have or  
109 obtains an abortion for herself is not criminally liable.

110 (ii) A woman upon whom a partial birth abortion is performed may not be prosecuted  
111 under Section 76-7-326 or 76-7-329 for a conspiracy to violate Section 76-7-326 or 76-7-329.

112 (2) A willful violation of Section 76-7-307, 76-7-308, 76-7-310, 76-7-310.5, 76-7-311,  
113 or 76-7-312 is a felony of the third degree.

114 (3) A violation of Section 76-7-326 or 76-7-329 is a felony of the third degree.

115 ~~[(3)]~~ (4) A violation of any other provision of this part is a class A misdemeanor.

116 Section 4. Section **76-7-326** is enacted to read:

117 **76-7-326. Partial birth abortions prohibited.**

118 Any physician who knowingly performs a partial birth abortion and thereby kills a  
119 human fetus shall be fined or imprisoned, or both, as provided under this part. This section  
120 does not apply to a partial birth abortion that is necessary to save the life of a mother whose life

121 is endangered by a physical disorder, physical illness, or physical injury, including a life  
 122 endangering physical condition caused by or arising from the pregnancy itself.

123 Section 5. Section **76-7-327** is enacted to read:

124 **76-7-327. Remedies for father or maternal grandparents.**

125 (1) The father, if married to the mother at the time she receives a partial birth abortion,  
 126 and if the mother has not attained the age of 18 years at the time of the abortion, the maternal  
 127 grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy  
 128 resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

129 (2) Such relief shall include:

130 (a) money damages for all injuries, psychological and physical, occasioned by the  
 131 violation of Section 76-7-326 or 76-7-329; and

132 (b) statutory damages equal to three times the cost of the partial birth abortion.

133 Section 6. Section **76-7-328** is enacted to read:

134 **76-7-328. Hearing to determine necessity of physician's conduct.**

135 (1) A physician accused of an offense under Section 76-7-326 may seek a hearing  
 136 before the Physicians Licensing Board created in Section 58-67-201, or the Osteopathic  
 137 Physician and Surgeon's Licensing Board created in Section 58-68-201 on whether the  
 138 physician's conduct was necessary to save the life of the mother whose life was endangered by  
 139 a physical disorder, physical illness, or physical injury, including a life endangering physical  
 140 condition caused by or arising from the pregnancy itself.

141 (2) The findings on that issue are admissible on that issue at the trial of the physician.

142 Upon a motion from the physician, the court shall delay the beginning of the trial for not more  
 143 than 30 days to permit such a hearing to take place.

144 Section 7. Section **76-7-329** is enacted to read:

145 **76-7-329. Person unauthorized to perform abortions -- Penalties.**

146 A person who is not legally authorized by the state to perform abortions, but who  
 147 nevertheless directly performs a partial birth abortion, is subject to Sections 76-7-301,  
 148 76-7-314, 76-7-326, and 76-7-327.

148a **Ĥ Section 8. Section 76-7-330 is enacted to read:**

148b **76-7-330. Contingent continuance of prior law.**

148c **(1) IF THE IMPLEMENTATION OF SECTION 76-7-326 ENACTED BY THIS BILL IS STAYED OR**  
 148d **OTHERWISE ORDERED BY A COURT OF COMPETENT JURISDICTION TO NOT BE IMPLEMENTED,**  
 148e **BEGINNING ON THE DAY ON WHICH THE IMPLEMENTATION OF SECTION 76-7-326 IS STAYED OR**  
 148f **OTHERWISE ORDERED NOT TO BE IMPLEMENTED THE STATUTES LISTED IN SUBSECTION (2)**

148g **SHALL: ĥ**

148h Ĥ (a) BE GIVEN EFFECT AS IF THIS BILL DID NOT AMEND THOSE STATUTES; AND  
148i (b) REMAIN IN EFFECT AS IF NOT AMENDED BY THIS BILL UNTIL THE DAY ON WHICH A  
148j COURT ORDERS THAT SECTION 76-7-326 MAY BE IMPLEMENTED.  
148k (2) SUBSECTION (1) APPLIES TO:  
148l (a) SECTION 76-7-301;  
148m (b) SECTION 76-7-310.5; AND  
148n (c) SECTION 76-7-314.  
148o (3) NOTHING IN THIS SECTION PREVENTS THE LEGISLATURE FROM AMENDING,  
148p REPEALING, OR TAKING ANY OTHER ACTION REGARDING THE SECTIONS LISTED IN SUBSECTION  
148q (2) IN THIS OR A SUBSEQUENT SESSION. ĥ

**Legislative Review Note**

as of 1-30-04 10:51 AM

The legislative prohibition of partial birth abortion procedures in this bill raises constitutional issues. The United States Supreme Court has considered the constitutionality of a ban on partial birth abortions in Stenberg v. Carhart, 530 U.S. 914 (2000). In Stenberg, the Nebraska statute was held to be unconstitutional for at least two independent reasons: first, because the law lacked any exception for the preservation of the health of the woman, and second, because it imposed an undue burden on a woman's ability to choose a more commonly used method of abortion, thereby unduly burdening the right to choose abortion itself. See Stenberg, 530 U.S. at 930 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 874 (1992)).

The United States Court of Appeals for the Sixth Circuit recently ruled that an Ohio statute prohibiting partial birth abortion was constitutional. The court held that Ohio's statute did "not restrict the most commonly used procedure for second trimester abortions . . . [and] provide[d] an exception for significant health risks" and therefore did "not impose an undue burden on a woman's right to abort a non-viable fetus." Women's Medical Professional Corp. v. Taft, 2003 U.S. App. Lexis 25413, 2003 Fed. App. 0446P (6th Cir. Dec. 17, 2003). The Ohio statute allows a partial birth abortion for either the preservation of the life or health of the woman. This bill provides an exception for the life of the woman; it does not provide a health exception as appears to be required by both the United States Supreme Court and Sixth Circuit Court cases.

**Office of Legislative Research and General Counsel**